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Case No. 84-898

IN THE

Supreme Court of the United States

1984-85 TERM

ZBIGNIEW W. DYBCZAK,
Petitioner,

v.

TUSKEGEE INSTITUTE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARVIN S. COHEN
STROOCK & STROOCK & LAVAN
1150 17th Street, N.W.
Washington, D.C. 20036
Attorney for Respondent Tuskegee Institute

Of Counsel:
FRED D. GRAY
GRAY, LANGFORD, SAPP, DAVIS & MCGOWAN
P.O. Box 239
Tuskegee, Alabama 36083

QUESTIONS PRESENTED FOR REVIEW

1. Where a plaintiff in an employment discrimination case sought only specific injunctive relief and damages and the jury found against plaintiff, did the trial court err in refusing to enjoin alleged generally discriminatory employment conduct, particularly when such general injunction would not benefit plaintiff?

2. In the absence of credible evidence that a discriminatory motive was a significant or substantial factor in the complained of employment decisions concerning plaintiff, did the trial court err in refusing to instruct the jury that the burden of proof had shifted to the defendant?

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STATEMENT OF THE CASE

This proceeding is before the Court on petition for writ of certiorari seeking review of the decision of the United States Court of Appeals for the Eleventh Circuit that affirmed a jury verdict and trial court judgment and order in favor of respondent. *Dybczak v. Tuskegee Institute*, 737 F.2d 1524 (11th Cir.) *reh. denied*, 744 F.2d 97 (1984).

A. Course of Proceedings and Dispositions in the Courts Below

Petitioner instituted this action by filing a complaint in the United States District Court for the Middle District of Alabama, alleging, in essence, that he had been discriminated against in his employment by respondent on the basis of race. He sought reinstatement as Dean of the School of Engineering of Tuskegee Institute, back pay and attorneys' fees under Title VII of the

Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* and damages under 42 U.S.C. § 1981.

The case was tried to a jury which returned its verdict in favor of respondent Tuskegee Institute. Subsequently the trial court entered judgment on the jury verdict, issued its memorandum opinion and entered judgment in favor of respondent on the issues of equitable relief reserved to the court.

The Court of Appeals affirmed the judgments of the district court. It held that "in a suit brought in the plaintiff's individual capacity, injunctive relief benefitting non-parties is not required if it in no way relates to the vindication of the plaintiff's rights." *Dybczak*, 737 F.2d at 1527, Pet. A-11. The Court also found that the jury was properly instructed under the standard articulated in *McDonell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

B. Statement of the Facts

This case arose from a dispute over salary and other terms of petitioner's reappointment as Dean of the School of Engineering at Tuskegee Institute for the academic year 1981-82. Petitioner was originally employed as Dean in 1960 under a three year contract. After 1963 he served by appointment of the President on an annual basis.

Petitioner began negotiations with the administration of the Institute in December 1980 over the terms of his reappointment as dean for the 1981-82 academic year. In February 1981, petitioner continued this dialogue by sending memoranda to the President. Petitioner sought a significant salary increase which would have made him the highest paid dean at the Institute. He also requested one year of sabbatical leave with pay beginning on December 22, 1981, and retroactive compensation for time allegedly spend during vacations on outside funded research projects in 1979 and 1980. Dr. L. H. Foster, the then President of the

Institute, responded to these demands by letter dated March 2, 1981 in which he offered petitioner a salary for the 1981-82 school year of $46,000 (a three thousand dollar, 7% increase over his existing salary) as well as sabbatical leave for one semester plus one summer. Dr. Foster in conformance with standard Institute policy declined to compensate petitioner retroactively for the research work performed on outside funded research projects during his vacations in earlier years. Petitioner responded on March 21, 1981 restating his demands.

By letter of April 13, 1981, Dr. Foster reiterated the Institute's policy on sabbatical leave and explained in detail the basis for the salary offer to petitioner. He also advised petitioner that he was not prepared to negotiate further on the matters of salary, sabbatical leave and retroactive compensation for vacation research work.

On June 5, 1981 Dr. Foster wrote petitioner a letter reappointing him as Dean of the School of Engineering for the year ending May 31, 1982 at an annual salary of $46,000; a salary that was exceeded only by those of the President of the Institute and the Dean of the School of Veterinary Medicine. By letter of June 19, 1981 petitioner replied that he was prepared to accept the reappointment subject to the Institute's honoring unspecified "delayed sabbatical provisions promised several years ago" and a salary increase to a level which he contended should be exceeded only by the salaries of the President and the Provost of the Institute.

By letter of June 22, 1981, Dr. Foster again stated the offer set forth in his letters of April 13th and June 5th and again emphasized he was not prepared to negotiate further. On July 1, 1981, petitioner wrote Dr. Foster a letter stating, in its entirety, "I regret that I cannot accept your offer of April 13 and June 22." The next day Dr. Foster, responded informing petitioner that he regarded the letter of July 1 as a rejection of the contract of employment as Dean of the School of Engineering and accordingly accepted petitioner's resignation. After accepting petitioner's resignation President Foster appointed Dr. Warren Clay

ton, a black American as Acting Dean of the School of Engineering.

Dr. Benjamin F. Payton became the President of Tuskegee Institute on August 1, 1981. On August 12, 1981, Dr. Payton had an extensive discussion with petitioner concerning the problems petitioner felt he had with the Institute. Petitioner subsequently wrote Dr. Payton summarizing his grievances and asking him to void Dr. Foster's actions concerning his reappointment as dean. Dr. Payton did not reappoint petitioner as dean. He did, however, affirm petitioner's appointment as a tenured professor of mechanical engineering and authorized a paid leave of absence from August 1, 1981 to May 31, 1982. Petitioner accepted Dr. Payton's offer "under protest." He is currently employed as a professor of engineering at Tuskegee Institute.

In September 1981, President Payton appointed a search committee to solicit applications and nominate candidates for the position of Dean of the School of Engineering. The Committee ultimately recommended four candidates for Dr. Payton's consideration. Petitioner did not apply for the position until after the published deadline had expired and after the Committee had concluded its activities; his application and resume were, however, forwarded to Dr. Payton and he considered petitioner's qualifications when selecting a new dean.

As the new President, Dr. Payton planned to reorient and expand the School of Engineering at Tuskegee Institute. One particular aspect of that plan was the institution of a new program in aerospace science. Based on his appraisal of Dr. Vascar Harris' general academic qualifications and experience and his particular qualifications and interests in engineering disciplines related to aerospace science, Dr. Payton appointed him as Dean of the School of Engineering effective August 15, 1982.

During the course of this litigation, documentary evidence from petitioner's personnel file was introduced indicating that in 1973 former President Foster had received a report that some faculty members felt the petitioner was not employing enough blacks on his faculty, and that this matter was raised again in

1975. Dr. Foster did not believe petitioner was as knowledgeable of some of the pools of black engineering teachers from which to recruit faculty as he might have been. When questioned about this, he stated that in 1973:

> We had the feeling that the pool that he (petitioner) was drawing from was not nearly large enough and that it did not represent the availability of potential faculty members for Tuskegee.

He further stated:

> Well, I think he was not tapping them as much as he might. Still looking at the persons and remembering that one of the qualifications, certainly for some of the teachers, would be to be role models in terms of what a youngster can be. Our youngsters come out of the rural areas, many of them, and they take engineering sometimes because it sounds exciting. But if they could see a real engineer who has gone somewhere and done some things, it would mean something to them. It can be helpful in motivation.

It was clear that Dr. Foster's main policy was to hire the best qualified faculty available regardless of race. In that regard, he testified:

> As I was saying just a moment ago, we were looking for role models from the total society in order to provide the experiences and educational development for our student body that came from the whole society, and black role models would be a part of that total picture.
>
> * * *
>
> We felt that the—to provide the total experience for our students in Engineering, that it would be well if there were some more blacks; but our main concern was to have quality teachers; and what we always were really pushing for was a pool of candidates that from which the best qualified might be selected and we knew there was difficulty in—sometimes in finding blacks, but the situation had been improving generally in recent years, and we thought that that would be—with a larger pool, that there would be the likelihood that there would be some more blacks on the—on the faculty.

After this issue first arose in 1973, Dr. Foster reappointed petitioner as Dean of the School of Engineering every year to and including 1981.

Dr. Foster's testimony showed that regardless of his concern for providing appropriate role models for the students at Tuskegee Institute that factor had no bearing whatsoever on his acceptance of petitioner's resignation as dean after he rejected the offer of reappointment in 1981. Under cross examination at trial he responded:

> Q. Doctor, there has been extensive testimony here back in '73 and '75, you talked about, at least you characterize it in your deposition this year, about some black role models and wanting more black faculty members?
> A. Uh, huh.
> Q. When you accepted Dr. Dybczak's resignation in July, did you consider at all your conversations with him or your desire to have black role models?
> A. No.
> Q. Did that come in the picture?
> A. No, no.
> Q. Were you trying to just get rid of him?
> A. No, indeed; he was trying to get rid of us, we thought. He declined our offer.

With regard to schools other than the School of Engineering, plaintiff's counsel asked Dr. Foster whether he had told other deans at Tuskegee that they needed to employ more black faculty; Dr. Foster responded:

> No, I don't think I had . . . . As a matter of fact, we were moving in the other direction in the other departments of reducing the number of black faculty and increasing the number of others, in order to provide this total larger ambience in (sic) setting for our students.

This was the only evidence presented in support of petitioner's allegation that respondent had a purported policy of preferring blacks in the employment of faculty. There was no evidence whatsoever that blacks had ever been preferred over other races

in the actual employment of faculty in any of the Institute's colleges or schools.

SUMMARY OF ARGUMENT

A. There was no evidentiary basis for concluding that Tuskegee Institute followed any pattern, practice or policy of preferring the employment of black faculty members over faculty members of other races. Even if there had been, the facts in this case did not warrant the issuance of a prospective class-wide injunction against such pattern, practice or policy, since petitioner is a tenured professor who would not have benefitted from such an injunction. In an individual employment discrimination case, broad injunctive relief is not warranted unless it is incidental or necessary to the resolution of the pending controversy.

The Court of Appeals for the Eleventh Circuit concluded that in this suit, which was brought by petitioner in his individual capacity, injunctive relief benefiting nonparties was not required because it in no way related to the vindication of petitioner's rights. This holding raises no unsettled question of federal law or conflicts with the decisions of this Court or other federal courts of appeals which would warrant further review.

B. There was no evidence that a discriminatory motive was a significant or substantial factor in the Institute's decisions concerning petitioner's reappointment as dean. Consequently, the trial court correctly instructed the jury under the principles established in *McDonnell Douglas* and *Burdine*. It was not error to reject a *Lee* v. *Russell County Board of Education* instruction shifting the burden of proof to defendant.

No new issue of law has been presented; no conflict among the federal courts of appeals is alleged. The only issue raised by petitioner is sufficiency of the evidence below. The trial court and the appeals court having found that the evidence presented did not support giving the *Lee* instruction, no issue of sufficient import exists here to justify review by this Court.

ARGUMENT

This is a case in which the Dean of the School of Engineering of Tuskegee Institute refused to accept reappointment unless his demands for salary and other benefits were met. When the Institute replaced him as dean, petitioner, a male Caucasian, brought this action seeking reinstatement on the basis of alleged racial discrimination.

The only evidence petitioner was able to present at trial which related to possible discrimination was that in 1973 and 1975, the former president of the Institute was concerned that petitioner was not seeking more black applicants for the pool from which Engineering faculty was chosen, thereby increasing the possibility that engineering students might have black role models among the faculty. Notwithstanding this concern of the former president, he reappointed petitioner as dean every year after 1973 up to and including 1981. Petitioner's position as dean terminated only after he unequivocally rejected reappointment tendered to him in 1981, which included an increase in salary and a paid leave of absence.

After hearing all of the evidence, the jury and the trial court found for the Institute. On appeal petitioner claimed that the former president's concern about role models in the School of Engineering constituted a "pattern, practice and policy of encouraging the employment of black faculty members over faculty members of other races." He sought an injunction of prospective general application against such pattern, practice and policy.

Petitioner also contended that the "role model" evidence warranted a jury instruction under *Lee v. Russell County Board of Education* shifting the burden of proof from plaintiff to defendant, rather than the *McDonnell Douglas—Burdine* instruction actually given by the trial court.

The Court of Appeals found both contentions to be without merit.

A. Petitioner Is Not Entitled to An Injunction Against An Alleged Practice of Preferring Blacks in Employing Faculty

Petitioner seeks review in this case to establish that he is entitled to an injunction barring respondent's alleged policy of preferring black "role models" in hiring faculty. In support of his assertions he relies principally on *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 34 L.Ed.2d 415, 93 S.Ct. 364 (1972); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 52 L.Ed.2d 396, 97 S. Ct. 1843 (1977) and *NAACP v. City of Evergreen*, 693 F.2d 1367 (11th Cir. 1982).

Respondent's reliance is misplaced. *Trafficante* held only that the Civil Rights Act of 1964 gave "standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute." *Trafficante*, 409 U.S. at 211, 34 L.Ed.2d at 420. That case clearly concerns only standing because the District Court had dismissed the complaint on that basis and had not reached the merits before appellate review. Thus, it cannot stand as precedent for granting a remedy in a case where a jury has found in favor of defendant on the plaintiff's charges of racially discriminatory hiring practices. Most assuredly the decision of the Court of Appeals in the instant case cannot be said to be in conflict with the decision of this Court in *Trafficante*.

The issue in *Evergreen* was whether prospective injunctive relief was appropriate when the illegal conduct sought to be enjoined had ceased. The trial court had found that the discrimination complained of no longer existed and declined to issue an injunction. On appeal the Court held "[a]lthough the court found that discrimination no longer exists, the power to issue an injunction survives discontinuance of the illegal conduct sought to be enjoined." *Evergreen*, 693 F.2d at 1370. The decision rests on the holding that:

> The district judge clearly erred in stating that "[i]t is insignificant whether this change is due to the filing of the EEOC charge and this suit." Courts should keep in mind the oft-

> repeated observation that "reform timed to anticipate or blunt the force of a lawsuit offer[s] insufficient assurance that the practice sought to be enjoined will not be repeated." *Id.*

It was clear in *Evergreen* that there was "abundant evidence in the record of consistent past discrimination" and in fact the trial court found that discrimination had been practiced. The only issue was whether injunctive relief should be granted. In contrast the only evidence from which petitioner in the present case sought to imply discrimination was scattered testimony that the former President of Tuskegee Institute had been concerned with the scarcity of black role models in the School of Engineering. The incidents cited in support of this allegation occurred in 1973 and 1975, many years before petitioner rejected his reappointment as Dean of the School of Engineering which led to this lawsuit. There is also ample rebuttal evidence from the former President that it was always his policy to hire the best qualified person available irrespective of race. Thus, there was sufficient evidence to support the jury's finding of no liability and the judge's determination that no injunctive relief was warranted. This case is radically different from *Evergreen* both as to the issues for which review is sought and the underlying facts.

Petitioner asserts that injunctive relief is mandatory in cases of established discrimination. This Court has not held such relief to be mandatory, and, in any case, no discrimination has been established in the present case.

In *Teamsters*, where the Court actually found a pattern or practice of discrimination and held prospective relief to be justified, injunctive relief was not considered mandatory, but was cited as one of several alternatives. *Teamsters*, 431 U.S. at 361, 52 L.Ed.2d at 431. In the present case, there was no evidentiary basis for concluding that the Institute follows any pattern, practice or policy of preferring the employment of black faculty members over faculty members of other races. Discrimination was not established. The jury verdict established quite the contrary.

The Court of Appeals was quite correct then in relying on *Meyer v. Brown & Root Construction Co.*, 661 F.2d 369 (5th Cir. 1981) and *Gregory v. Litton Systems, Inc.*, 472 F.2d 631 (9th Cir. 1972) in holding that "in a suit brought in the plaintiff's individual capacity, injunctive relief benefitting nonparties is not required if it in no way relates to the vindication of the plaintiff's rights." *Dybczak*, 737 F.2d at 1527; Pet. A-11. If the facts in *Gregory* and *Meyer* did not warrant an injunctive remedy, then clearly none is warranted by the facts in this case. In *Gregory*, defendant's practice of requiring job applicants to reveal their arrest records was held to be racially discriminatory and plaintiff was awarded damages and attorney fees. In *Meyer*, defendant's action in reassigning plaintiff to a more strenuous position while she was pregnant was found to be disparate treatment based on sex and plaintiff was awarded damages and attorney fees. In neither case was injunctive relief found to be warranted.

In the case at bar the jury found that the petitioner had not been discriminated against. Obviously it cannot be said that broad injunctive relief, primarily benefitting non-parties, is necessary to give petitioner the relief to which he is entitled when it has been declared that he is not entitled to any relief at all.

Clearly the three federal courts of appeals that have ruled on this issue (Fifth, Ninth and Eleventh Circuits) are in agreement. Nor, in view of the unanimity of the decisions, can it be said to be an undecided question of federal law of such importance that it should be settled by this Court. Thus the grounds for granting a petition for a writ of certiorari are not present.

B. The Jury Was Correctly Charged Under the Standards Established by this Court in McDonnell Douglas and Burdine

Petitioner's objection to the jury instructions arises from his contention that the standard of proof applicable to this case is the one articulated in *Lee v. Russell County Board of Education*, 684 F.2d 769 (11th Cir. 1982) rather than the standard applicable to the typical Title VII proceedings as set forth by this Court

in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973) and amplified in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981).

The *McDonnell Douglas* test was elaborated in *Burdine* as follows:

> First the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate nondiscriminatory reason for the employee's rejection . . . . Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination . . . .
>
> The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff . . . . The McDonnell Douglas division of intermediate evidentiary burdens serves to bring the litigants and the court expeditiously and fairly to this ultimate question. 450 U.S. at 252-53, 67 L.Ed.2d at 215.

The standard of proof set forth in *Lee* and urged by petitioner is applicable only under certain factual circumstances not present here. Under the *Lee* test where actual discrimination against plaintiff has been proved, the defendant has the burden of satisfying the jury that the contested employment decision would have been made even absent the discriminatory factor. The *Lee* test is applicable only when plaintiff has established by direct evidence that defendant acted against plaintiff with discriminatory motive. *Lee, supra* at 774.

Petitioner also relies upon this Court's decision in *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977). That decision does not compel the mode of proof or jury instructions urged by petitioner. In that case conduct protected by the First Amendment was established to have

been a motivating factor in an adverse employment decision. The lower court had given defendant no opportunity to prove that the employment decision would have been made in any case. This Court held that even where the protected conduct had been a motivating factor, defendant should not be liable if it could show that the same decision would have been made in the absence of the protected conduct. 429 U.S. at 287, 50 L.Ed.2d at 483-84.

In the case at bar, petitioner did not prove that any discriminatory motive was a significant or substantial factor in the Institute's employment decisions concerning him. The only evidence petitioner urges in support of his contention that the *Lee* standard is applicable is that former President Foster was concerned starting in 1973 that petitioner was not as knowledgeable of the pools of qualified black teachers from which to recruit faculty as he might have been. This clearly does not rise to a showing of a discriminatory motive in hiring faculty.

The Court of Appeals' conclusion that that evidence was "not *directly* probative of the Institute's intent when dealing with [petitioner] in particular, "*Dybzcak*, 737 F.2d at 1528; Pet. A-16, was sufficient basis for holding that the "charge suggested by *Lee* would have been inappropriate." *Id.* There is no claim in the petition for writ of certiorari that the jury charge actually given did not conform to the *McDonnell Douglas—Burdine* standard. Nor does petitioner contend that the *McDonnell Douglas—Burdine* instruction itself requires review or modification by this Court. He contends that the evidence below justified the *Lee* instruction rather than the *McDonnell Douglas—Burdine* instruction.

The trial court found and the appeals court affirmed that there was no credible evidence that a discriminatory motive was a significant or substantial factor in the complained of employment decision concerning petitioner. Therefore, the *Lee* instruction was refused.

No new issue of law has been presented; no conflict among the federal courts of appeals is alleged. Petitioner merely disagrees

with the trial court's evaluation of the evidence, as affirmed by the appeals court. No basis whatsoever has been shown for further review by this Court.

CONCLUSION

The petition for writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit in *Dybczak v. Tuskegee Institute* should be denied or an order summarily affirming that decision should be issued.

Respectfully submitted,

MARVIN S. COHEN
STROOCK & STROOCK & LAVAN
1150 17th Street, N.W.
Washington, D.C. 20036
(202) 452-9250

Attorney for Respondent
Tuskegee Institute

Of Counsel:

FRED D. GRAY
GRAY, LANGFORD, SAPP,
DAVIS & MCGOWAN
P.O. Box 239
Tuskegee, Alabama 36083

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief in Opposition to Petition for Writ of Certiorari was served on Petitioner by mailing three copies thereof to his attorneys Alvin T. Prestwood and Claude P. Rosser, Jr., Prestwood & Rosser, P.O. Box 217, Montgomery, Alabama 36101-0217, first class postage prepaid on January 4, 1985.

(signed) Marvin S. Cohen

MARVIN S. COHEN